BALACHANDRAN

v.

PP

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
PAJAN SINGH GILL FCJ
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: 05-42-2002 (W)]
23 NOVEMBER 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 12(2) & 39A(2) - Possession of monoacetylmorphines - Prima facie case - Whether case proved beyond reasonable doubt - Failure to tender police report of key witness - Omission by chemist to state amount of drugs tested and modes of tests conducted - Whether fatal - Dangerous Drugs Act 1952 ss. 12(2), 39A(2), 37(j) - Evidence Act 1950, ss. 51, 114(g), 145, 157 - Criminal Procedure Code, ss. 180(1), 182A*

CRIMINAL PROCEDURE: *Sentence - Possession of drugs - Possession of 73.34g of monoacetylmorphines - Sentenced to 16 years' imprisonment and 11 strokes of the rotan - Whether adequate*

EVIDENCE: *Expert evidence - Evidence of chemist - Whether could be accepted at face value - Possession of dangerous drugs - Omission to state amount of drugs tested and modes of tests conducted - Whether evidence fatally flawed - Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 37(j) - Evidence Act 1950, s. 51, 114(g), 145, 157*

EVIDENCE: *Documentary evidence - First information report - Police report - Nature and purport - Whether substantive evidence of its contents - Whether only to corroborate or contradict testimony - Failure to tender police report of key witness - Whether need not be fatal - Evidence Act 1950, s. 51, 114(g) 145, 157*

This was an appeal against the decision of the Court of Appeal affirming the decision of the High Court convicting the appellant of an offence under s. 12(2) read with s. 39A(2) of the Dangerous Drugs Act 1952 ('the Act') for possession of 73.34g of monoacetylmorphines and sentencing him to 16 years' imprisonment and 11 strokes of the rotan.

Before the learned judges of the Federal Court, the appellant argued that the conviction was unsustainable as the prosecution, while solely relying on the evidence of the police officer PW1, had not tendered the police report lodged by PW1 pertaining to the arrest of the appellant and the seizure of the dangerous drugs, and further that, the chemist, in his evidence, had not adverted to the amount of drugs tested and the modes of tests conducted. It was further argued that the trial was flawed as the learned judge, at the end of the prosecution case, was bound to apply but had not applied the "beyond reasonable doubt" standard of proof to the evidence before him. In the upshot, questions arose as to: (i) whether the prosecution's failure to produce the police report herein ought to attract the adverse inference of s. 114(g) Evidence Act 1950; (ii) whether the evidence of the chemist, on account of his alleged omissions, could be said to be insufficient; and (iii) whether the learned trial judge could be faulted for employing the *"prima facie"* standard of proof at the end of the prosecution case.

Held (dismissing the appeal)
Per Augustine Paul JCA delivering the judgment of the court:

[1] The evidentiary value of a first information report is only to contradict the testimony of a witness under s. 145 of the Evidence Act 1950 or to corroborate his testimony under s. 157 of the said Act. It is not substantive evidence of its contents. It follows that where the evidence of a witness does not require to be corroborated, there is no obligation in law to tender corroborative evidence to support his testimony. (p 94 c-e)

[1a] The learned trial judge in the instant case had accepted the evidence of PW1 which was supported by the testimony of PW3. That being so, the need for PW1's evidence to be corroborated by his police report does not arise. (p 95 e-f)

[2] The appellant's submission on the chemist's failure to state the amount of monoacetylmorphines analysed by him could only be relevant if the chemist had not analysed all the substances in question. The evidence showed however that he had analysed all of the pinkish substances in each of the packages and it is also confirmed during analysis that the pinkish substances in the five packages were powdered. This made it patent that the chemist had analysed all the substances handed to him thereby making it unnecessary for the prosecution to rely on s. 37(j) of the Act. (p 98 a-c)

[2a] As to the chemist's failure to give evidence of the tests carried out by him, clearly the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step (unless it is inherently incredible or that the defence had called in evidence in rebuttal by another expert). As it were, the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances, the evidence of a chemist is not controlled by s. 51 of the Evidence Act 1950 thereby making it unnecessary for him to testify on the tests conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient. (p 98 b-f)

[3] Section 180(1) of the Criminal Procedure Code ('CPC') makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The submission of the appellant that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a prima facie basis is therefore contrary to the clear and plain language of s. 180 and s. 182A of the CPC. It cannot be sustained. (pp 99 f & 101 c)

[4] The learned trial judge had not erred in imposing the sentence. He had taken the relevant factors like the element of public interest and the weight of drugs involved into consideration. (p 102 c-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan kerana mengesahkan keputusan Mahkamah Tinggi yang mensabitkan perayu atas kesalahan di bawah s. 12(2) di baca bersama s. 39A(2) Akta Dadah Berbahaya 1952 (Ákta') kerana memiliki 73.34 gram monoacetylmorphines dan menjatuhkan hukuman penjara 16 tahun dan 11 sebatan ke atasnya.

Di hadapan yang arif hakim-hakim Mahkamah Persekutuan, perayu berhujah bahawa sabitan tidak boleh dipertahankan oleh kerana pendakwaan, sementara bergantung sepenuhnya kepada keterangan pegawai polis SP1, telah tidak mengemukakan laporan polis yang dibuat oleh SP1 berkaitan dengan pengangkapan perayu dan perampasan dadah, dan juga, kerana ahli kimia, dalam keterangannya, telah tidak menyentuh langsung tentang jumlah berat

dadah yang dianalisa serta jenis-jenis ujian yang dijalankan. Dihujahkan selanjutnya bahawa perbicaraan adalah cacat oleh kerana yang arif hakim, di akhir kes pendakwaan sepatutnya memakai tetapi gagal menggunakan standard pembuktian "di luar keraguan munasabah" kepada keterangan-keterangan yang berada di hadapannya. Dengan yang demikian, persoalan-persoalan telah berbangkit mengenai: (i) sama ada kegagalan pendakwaan mengemukakan laporan polis di sini telah menambat inferens berlawanan di bawah s. 114(g) Akta Keterangan 1950; (ii) sama ada keterangan ahli kimia, mengambilkira ketinggalannya yang dikatakan itu, adalah tidak memadai; dan (iii) sama ada yang arif hakim bicara boleh dipersalahkan kerana memakai standard pembuktian *"prima facie"* di akhir kes pendakwaan.

Diputuskan (menolak rayuan)
Oleh Augustine Paul HMR menyampaikan penghakiman mahkamah:

[1] Nilai keterangan sesuatu laporan maklumat pertama hanyalah untuk menyanggah testimoni seseorang saksi di bawah s. 145 Akta Keterangan 1950 atau untuk menyokong testimoninya itu di bawah s. 157 Akta tersebut. Ia bukanlah keterangan substantif mengenai kandungannya. Ianya mengikut bahawa di mana keterangan seseorang saksi tidak perlu disokong, maka tiada kewajipan di sisi undang-undang untuk mengemukakan keterangan sokongan bagi menyokong testimoni tersebut.

[1a] Yang arif hakim dalam kes semasa telah menerima keterangan SP1 yang mana keterangan tersebut telah disokong oleh keterangan SP3. Dalam keadaan sedemikian, keperluan untuk keterangan SP1 disokong oleh laporan polisnya sudah tidak lagi berbangkit.

[2] Hujah perayu mengenai kegagalan ahli kimia menyatakan jumlah monoacetylmorphines yang dianalisanya hanya menjadi relevan jika ahli kimia tidak menganalisa kesemua dadah tersebut. Keterangan menunjukkan bahawa beliau telah menganalisa kesemua bahan berwarna merah jambu dalam setiap lima bungkusan dan mendapati semasa ujian bahawa kesemuanya adalah berbedak. Ini menunjukkan bahawa ahli kimia telah menganalisa kesemua bahan-bahan yang diserahkan kepadanya tersebut sekaligus menjadikannya tidak perlu bagi pendakwaan untuk bergantung kepada s. 37(j) Akta.

[2a] Berhubung kegagalan ahli kimia memberi keterangan mengenai ujian-ujian yang dijalankannya, adalah jelas bahawa mahkamah berhak untuk menerima keterangan ahli kimia atas nilai mukanya tanpa perlu baginya memberi keterangan terperinci tentang apa yang dibuatnya di dalam makmal langkah demi langkah (kecuali jika keterangannya itu tidak

boleh dipercayai secara semulajadinya atau jika pembelaan memanggil keterangan menyangkal oleh pakar lain). Apapun, keterangan ahli kimia berkaitan dadah berbahaya yang dianalisa olehnya adalah berbentuk fakta dan bukannya suatu pendapat. Dengan demikian, keterangan ahli kimia tidak tertakluk kepada s. 51 Akta Keterangan 1950 sekaligus menjadikan tidak perlu baginya untuk memberi keterangan tentang ujian-ujian yang dijalankan olehnya dalam mencapai keputusan-keputusan beliau. Keterangan ahli kimia dengan itu adalah mencukupi.

[3] Seksyen 180(1) Kanun Prosedur Jenayah ('KPJ') menjelaskan bahawa standard pembuktian oleh pendakwaan di akhir kes mereka adalah untuk membuktikan suatu kes prima facie manakala s. 182A(1) menetapkan bahawa pada penutup perbicaraan mahkamah hendaklah menimbang keseluruhan keterangan dan memutuskan sama ada pendakwaan telah membuktikan kes mereka di luar keraguan munasabah. Dengan itu, hujah perayu bahawa beban atas pendakwaan di akhir kes mereka adalah untuk membuktikan kes di luar keraguan munasabah dan bukannya suatu kes *prima facie* adalah bertentangan dengan perbahasaan nyata s. 180 dan 182A KPJ. Hujah tersebut tidak boleh diperakui.

[4] Yang arif hakim bicara tidak silap dalam menjatuhkan hukuman. Beliau telah mengambil kira faktor-faktor relevan seperti unsur kesejahteraan awam dan berat dadah yang terlibat.

Case(s) referred to:
Au Ah Lin v. PP [1963] MLJ 365 ***(refd)***
Chin Khing Siong v. R [1952] MLJ 74 ***(refd)***
Emperor v. Khwaja Nazir Ahmad AIR [1945] PC 18 ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 3 MLJ 457 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
Lim Guan Eng v. PP [2000] 2 CLJ 541 FC ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Ooi Hock Leong v. R [1955] MLJ 229 ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 2 MLJ 70 ***(refd)***
PP v. Chan Kim Choi [1989] 1 MLJ 404 ***(refd)***
PP v. Lam San [1991] 3 MLJ 426 ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
R v. Storey [1968] 52 Cr App 334 ***(refd)***
Tan Cheng Kooi & Anor v. PP [1972] 2 MLJ 115 ***(refd)***
Vadivelu Thevar v. State of Madras AIR [1957] SC 614 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 108A, 180(1), (2), (3), 182A
Dangerous Drugs Act 1952, ss. 12(2), 37(j), 39A(2), 39B(1)(a)
Evidence Act 1950, ss. 35, 51, 114(g), 134, 145, 157

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Teo Say Eng DPP

[Appeal from Court of Appeal, Criminal Appeal No: W-05-10-2000]

Reported by WA Sharif

JUDGMENT

Augustine Paul JCA:

The accused was originally charged with trafficking in 73.34 grammes of monoacetylmorphines under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). At the close of the case for the prosecution the charge was reduced to one under s. 12(2) read with s. 39A(2) of the Act. When he was found guilty of the amended charge he was convicted and sentenced to 16 years' imprisonment and whipping of 11 strokes. His appeal against conviction and sentence was dismissed by the Court of Appeal and he has now appealed to this court.

The facts of the case as summarised by the learned trial judge in his grounds of judgment read as follows:

> Pada 23 September 1998 jam 8.25 malam, Inspektor Wan Azlan (SP1) dan 13 anggota polis yang lain, telah membuat serang hendap di hadapan Sekolah Rendah Jenis Kebangsaan Cina Mun Chong, Batu 5, Jalan Ipoh Kuala Lumpur. SP1 telah nampak OKT membimbit satu beg plastik warna oren P11 di tangan kirinya dan berjalan menuju ke kereta No. JBW 2490. Pada masa itu SP1 berada pada jarak 10-15 meter daripada OKT. OKT berseorangan ketika itu. Tidak ada sesiapa pun di dalam kereta itu. SP1 dan D/L/Kpl. Fairuz Khan (SP3) terus menghampiri OKT dengan menaiki sebuah motosikal yang dipandu oleh SP3. SP1 mengenalkan dirinya sebagai Polis kepada OKT dan OKT telah cuba melarikan diri. Satu pergelutan telah berlaku. P11 yang dipegang oleh OKT terjatuh ke tanah dan dirampas oleh SP1. Akhirnya, OKT telah berjaya ditangkap.
>
> SP1 telah memeriksa P11 di hadapan OKT dan didapati mengandungi 1 beg plastic warna putih (P12) di dalamnya yang mengandungi 5 bungkusan, terdiri dari 1 bungkusan keratan akhbar Cina (P13) dan 4 bungkusan warna coklat (P14). Setiap bungkusan tersebut mengandungi 1 paket plastik berisi ketulan dan serbuk merah jambu yang disyaki dadah heroin. Satu talipon bimbit Nokia (P5) dan satu dompet (P6) berisi wang tunai RM300/= dan 6 keping kad kredit juga dirampas daripada OKT.

5 bungkusan tersebut telah dihantar ke Jabatan Kimia, Petaling Jaya untuk dianalisis. Ahli Kimia, Encik Cheong Meow Kioon (SP2) telah menjalankan analisis dan mengesahkan bahan ketulan dan serbuk merah jambu dalam 5 bungkusan tersebut mengandungi dadah berbahaya, jenis monoacetylmorphines dan beratnya ialah 73.34 gram. Jumlah berat bahan ketulan dan serbuk merah jambu ialah 2,249.5 gram semuanya. Monoacetyl-morphines adalah dadah berbahaya yang disenaraikan di bawah Jadual Pertama kepada Akta. SP2 juga telah menyediakan satu laporan kimia (P19) yang mana satu salinannya telah diserahkan kepada OKT.

Keputusan di akhir kes pendakwaan

Selepas mendengar hujah-hujah kedua belah pihak dan meneliti serta menimbang segala keterangan yang ada terdiri dari 7 orang saksi dan 24 exhibit yang telah dikemukakan, saya dapati pihak pendakwa telah berjaya membuktikan secara prima facie bahawa OKT telah memiliki dadah berbahaya jenis monoacetylmorphines dan beratnya ialah 73.34 gram.

In explaining the reason for reducing the charge to one of possession he said:

Oleh kerana OKT telah dijumpai memiliki dadah monoacetylmorphines melebihi 15 gram, maka menurut seksyen 37(da) Akta, sehingga dibuktikan sebaliknya, OKT adalah dianggap mengedar dadah tersebut. Walau bagaimanapun, beban untuk mematahkan anggapan itu adalah ringan, iaitu atas imbangan kebarangkalian, dan ia boleh dipatahkan dengan keterangan yang ada walaupun di peringkat kes pendakwaan (sila lihat *Chee Chiew Heong v. Public Prosecutor* [1981] 2 MLJ 287). Dalam kes ini, saya dapati pihak pembelaan telah berjaya mematahkan anggapan pengedaran dengan kemungkinan wujudnya Shan dari awal kes pendakwaan. Pegawai Penyiasat, SP5 telah mengesahkan bahawa OKT telah mengatakan dalam pernyataan beramarannya (ID22) bahawa dadah yang dia bawa adalah kepunyaan Shan. Jadi kemungkinan besar Shan seorang pengedar dadah yang sebenarnya tidak boleh dikesampingkan. Dengan itu, saya beri manfaat keraguan kepada OKT. Walaupun begitu, pihak pendakwa telah berjaya membuktikan bahawa OKT telah memiliki dadah tersebut.

It is clear that in reducing the charge the learned trial judge had accepted the accused's version of events as contained in his cautioned statement. It is settled law that an exculpatory statement cannot form the basis of an order in favour of an accused person at the close of the case for the prosecution as the accused, not having given evidence at that stage, cannot rely on the statement without it having been tested by cross examination (see *Pendakwa Raya v. Mansor bin Mohd Rashid & Anor* [1997] 1 CLJ 233, *PP v. Adetunji Adeleye Sule* [1993] 2 MLJ 70, *PP v. Chan Kim Choi* [1989] 1 MLJ 404 and *R v. Storey* [1968] 52 Cr App R 334). It follows that the reliance of the learned trial judge on the exculpatory part of the accused's cautioned statement at that

stage cannot be sustained in law. However, the error does not amount to a miscarriage of justice to warrant intervention by us in view of a similar finding that he made at the close of the case for the defence. As he said in his grounds of judgment:

> Kemungkinan kewujudan Shan tidak boleh dikesampingkan. Itulah sebabnya mengapa pertuduhan pengedaran diperturunkan kepada kesalahan pemilikan.

In his submission before us learned counsel advanced several grounds of appeal. We gave anxious consideration to his arguments on the facts and the law. His complaints on the findings of fact of the learned trial judge, in particular, the rejection of the evidence of DW2 cannot be sustained as they have been well reasoned out. However, we felt that the submission on some of the points of law raised by learned counsel merit consideration. They are:

(a) The effect of failure by the prosecution to tender in evidence the police report made by PW1,

(b) The sufficiency of the evidence of the chemist, and

(c) The standard of proof on the prosecution at the close of the case for the prosecution.

We will now consider the issues that have been identified.

(a) The Effect Of Failure By The Prosecution To Tender In Evidence The Police Report Made By PW1

Learned counsel argued that the police report made by PW1, admissible under s. 108A of the Criminal Procedure Code ("s. 108A") and ss. 35 and 157 of the Evidence Act 1950, is a vital piece of evidence. It ought to have been tendered in evidence by the prosecution particularly as its case rested solely on the evidence of PW1. Accordingly, he contended that an adverse inference ought to have been drawn against the prosecution. In support he relied on the case of *Tan Cheng Kooi & Anor v. PP* [1972] 2 MLJ 115.

Section 108A reads as follows:

> In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of section 107 or 108, and purporting to be certified to be a true copy by the Officer in Charge of the Police District in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded.

The certified copy is thus admissible only as evidence of the contents of the original. In other words it takes the place of the original. Section 108A therefore deals only with the admissibility of a certified true copy of a first information report; its evidentiary value would therefore remain on the same footing as that of the original. In explaining its object and use as evidence Lord Porter in delivering the advice of the Privy Council in *Emperor v. Khwaja Nazir Ahmad* AIR [1945] PC 18 said at p. 20:

> In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined **if it is desired to do so**. (emphasis added)

Chang Min Tat J (as he then was) in dealing with the evidentiary value of a first information report said in *Tan Cheng Kooi & Anor v. PP* [1972] 2 MLJ 115 at p 118:

> Now the importance of a first information report has been stressed in a number of decisions. It is not a substantive piece of evidence and it is inadmissible for the purpose of proving that the facts stated in it are correct. But it can be used by way of corroboration or contradiction: per Carnduff J in 17 CWN 1213:
>
> > The first information is a document of great importance and in practice it is always and very rightly produced and proved in criminal trials. But it is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it.
>
> as cited in *Sohoni's Code of Criminal Procedure* (14th Edn) at page 275.
>
> > Although of great importance, the omission of a first information report does not however appear per se to be fatal to the prosecution. In *Ooi Hock Leong v. R* [1955] MLJ 229, Spenser-Wilkinson J (as he then was) while deploring the omission as very serious found on the record evidence other than from the complainant of the offence of the accused and dismissed the appeal against conviction. Gill J (as he then was) in *Public Prosecutor v. Foong Chee Cheong* [1970] 1 MLJ 97 was of the same mind. He held that the fact that no first information report was made was not itself a ground for throwing out a case. The case of *Ooi Hock Leong v. R, supra*, is however distinguishable and was distinguished by the learned judge himself from the earlier case of *Chin Khing Siong v. R* [1952] MLJ 74, and it is clear from his explanation that where the case against the accused depended entirely on the

> evidence of the complainant, the failure to produce the first information report had deprived the accused of an opportunity to cross examine his accuser and in these circumstances the presumption under section 114(g) of the Evidence Ordinance must be raised that the report would be unfavourable to the prosecution case. This rationale was followed by Smith J in *Teo Thin Chan & Anor v. Public Prosecutor* [1957] MLJ 184 where the appeal against conviction was allowed.

The passage just referred to makes it patent that the evidentiary value of a first information report is only to contradict the testimony of a witness under s. 145 of the Evidence Act 1950 or to corroborate his testimony under s. 157 of the said Act the operation of which is as explained in *Lim Guan Eng v. PP* [2000] 2 CLJ 541. It is not substantive evidence of its contents. The question that arises for determination, in the circumstances, is whether the failure to adduce in evidence the first information report is capable of an adverse inference being drawn against the prosecution under s. 114(g) of the Evidence Act 1950. Where the evidence of a witness does not require to be corroborated in law there is no obligation to tender corroborative evidence to support his testimony. Thus if the case for the prosecution rests solely on the evidence of one witness in such a category there is no requirement in law for his evidence to be corroborated. Any such requirement will conflict with s. 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This means that the testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 3 MLJ 457). However, the facts and circumstances of a particular case may make it desirable for his evidence to be corroborated. As Sinha J said in *Vadivelu Thevar v. State of Madras* AIR [1957] SC 614 at pp. 618-619:

> On the consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:
>
> (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
>
> (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and no general rule can be laid down in a manner like this and much depends upon the judicial discretion of the Judge before whom the case comes.

It is therefore clear that the need for a first information report to be used to corroborate the testimony of a witness depends on the facts and circumstances of each particular case. Where the evidence of a single witness who has made a first information report is vague it is most desirable to tender it in evidence in order to enhance his credibility. That was the basis of the judgment in cases such as *Chin Khing Siong v. R* [1952] MLJ 74 and *Ooi Hock Leong v. R* [1955] MLJ 229. Where it is not tendered in evidence in such a situation the evidence of the witness stands to be rejected; not because it lacks corroboration but because it may not pass the test of credibility and reliability on its own. It is only to that extent can it be said that the failure to produce the first information report is fatal. If indeed it contradicts the evidence of a witness it is the duty of the defence to use it in order to attack the credibility of the witness. Where that has not been done it would be a contradiction in terms for the defence to ask for an adverse inference to be drawn against the prosecution for failure to adduce it in evidence. On the contrary the failure of the defence to use it as described may lead rise to the inference that it is not adverse to the evidence of the witness. The corollary is that an adverse inference cannot be drawn against the prosecution for failure to tender in evidence a first information report and the strength of its case is to be assessed as it stands. The submission advanced by learned counsel cannot be sustained as the learned trial judge had accepted the evidence of PW1 which was supported by the testimony of PW3. The need for PW1's evidence to be corroborated by his police report therefore does not arise.

In any event the report made by PW1 (if any) is not the first information report as he himself obtained information regarding this case from one ASP Rosdi. Perhaps learned counsel was influenced by the judgment in *PP v. Lee Eng Kooi* [1993] 2 CLJ 534 where it was held that the repeal of the old s. 113(1) with the substitution as it now reads "… has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information reports" (at p. 330). The distinction between both types of reports is not anchored on rules relating to their admissibility but the purpose they serve. While a first information report serves as a complaint to the police to set the criminal law in motion the other reports relate to steps taken by the police thereafter as, for example, an arrest report. Thus any change in the law relating to their admissibility cannot alter their character. The distinction between both types of reports still remains. It must

be added that only the first information report is admissible under s. 108A in addition to ss. 145 and 157 of the Evidence Act 1950 while the other reports are admissible only under the latter provisions of law.

(b) The Sufficiency Of The Evidence Of The Chemist

In order to appreciate the submission of learned counsel on the sufficiency of the analysis of the dangerous drugs carried out by the chemist it is necessary to first set out the material parts of his evidence. It runs as follows:

> … The exhibits were handed to me for analysis for dangerous drugs. (N.B.: Insp Rajendran – was not around yet for identification).
>
> This is the official acknowledgement receipt issued to Insp Rajendran – produced as (P18).
>
> ID10 – box referred – this is the box received, produced as (P10).
>
> In this box are:
>
> 1. An orange plastic bag marked 'A' in which was a white plastic bag marked 'B' containing a newspaper package and 4 brown paper packages marked from 'C' to 'G' respectively. I found each of the 5 packages C to G to contain a plastic packet of pinkish granular powdery substance marked from C1 to G1, respectively.
>
> On 26/2/99 during office hours I carried out analysis and found the pinkish substances in the 5 packages C1 to G1 to contain monoacetymorphines (MAM). The result of the analysis are as follows:
>
> Package – C1
>
> Net weight of the pinkish substance was 458.9 grams. Monoacetylmorphines (MAM) obtained was 14.31 grams.
>
> Package – D1
>
> Net weight of the pinkish substance was 459.3 grams. MAM obtained was 16.44 grams.
>
> Package – E1
>
> Net weight of the pinkish substance was 443.2 grams. MAM obtained was 13.91 grams.
>
> Package – F1
>
> Net weight of the pinkish substance was 444.2 grams. MAM obtained was 13.59 grams.

Package – G1

Net weight of the pinkish substance was 443.9 grams. Weight of MAM was 15.09 grams. The total weight of pinkish substance obtained from the 5 packages was 2,249.5 grams. The total weight of MAM obtained was 73.34 grams.

The pinkish substance in 5 packages C1 to G1 had been powdered during analysis after which they were put into 5 separate plastic packets supplied by me and marked with laboratory number (PJ) For 8267/98 – 0 – followed by C1 to G1 respectively. …

XX : I agree the report was made under sec. 399 of the C.P.C. The gross weight of the 5 packages is 2,265.76 grams. The analysis started on 26/2/99.

Put : Your analysis was improper and inadequate.

A : I disagree.

t.t.
(Dato' Nik Hashim Bin Nik Ab Rahman)

Rexx : Gross weight is the weight of the pinkish substance plus the plastic packages containing the substance.

Learned counsel's submission on this issue was two-fold. Firstly, he contended that the evidence of the chemist does not state the amount of the drugs that he analysed. He said that this is fatal as s. 37(j) of the Dangerous Drugs Act 1952 ("s. 37(j)") requires an analysis of ten percent of the total amount of drugs. In support he relied on *Loo Kia Meng v. PP* [2000] 3 CLJ 653. In his reply the learned deputy public prosecutor argued that s. 37(j) does not arise for consideration as all the drugs seized had been analysed. He added that in any event the amount that is required to be analysed by s. 37(j) is ten percent of the receptacles as enunciated in *Au Ah Lin v. PP* [1963] MLJ 365 and not of the contents. Secondly, learned counsel submitted that the evidence of the chemist does not disclose the nature of the analysis conducted by him. He said that the chemist ought to have testified on the tests that he carried out in arriving at his conclusion. In his reply the learned deputy public prosecutor said that based on *PP v. Lam San* [1991] 3 MLJ 426 there is no obligation on the prosecution to lead such evidence which ought to have been elicited in cross examination which was not done.

The thrust of the first submission of learned counsel becomes a relevant matter for consideration only if the chemist had not analysed all the substances handed to him. The chemist had testified on the net weight of the pinkish substance in each of the five packages followed by the weight of monoacetylmorphines obtained from each package. This indicates that he had analysed all of the pinkish substances in each of the packages. It is confirmed by his evidence that the pinkish substances in the five packages were powdered during analysis. This makes it patent that the chemist had analysed all the substances handed to him thereby making it unnecessary for the prosecution to rely on s. 37(j). This part of the submission of learned counsel therefore does not require consideration by us.

The second part of the submission of learned counsel relates to the nature of the evidence that must be adduced from the chemist. It is true that the chemist did not give any evidence of the tests carried out by him in arriving at his conclusion. It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v. PP* [1987] 1 MLJ 492, *PP v. Lam San* [1991] 3 MLJ 426 and *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The rationale of this view is lucidly explained in *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances the evidence of a chemist is not controlled by s. 51 of the Evidence Act 1950 thereby making it unnecessary for him to testify on the tests conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient. The trial judge had accepted it. The defence did not seriously challenge the evidence beyond merely putting to the chemist that his analysis was improper and inadequate. The chemist disagreed with the suggestion. This submission of learned counsel cannot therefore be sustained.

We are thus unable to agree with the submission of learned counsel on the sufficiency of the evidence of the chemist.

(c) The Standard Of Proof On The Prosecution At The Close Of The Case For The Prosecution

Learned counsel submitted that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a *prima facie* basis as done in this case. The learned deputy public prosecutor relied on *Looi Kow Chai & Anor v. Pendakwa Raya* [2003] 1 CLJ 734 to disagree with the submission made.

As the offence in this case was committed in 1998 the burden of proof on the prosecution is governed by ss. 180 and 182A of the Criminal Procedure Code as amended in 1997 ("s. 180" and "s. 182A" respectively). They read as follows:

Section 180

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

Section 182A

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase "*prima facie* case" in s. 180. Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s. 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th edn as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the

Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

It follows that the submission of learned counsel that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a *prima facie* basis is contrary to the clear and plain language of s. 180 and s. 182A. It cannot therefore be sustained.

With the rejection of the submissions of learned counsel the appeal against conviction must be dismissed. Learned counsel did not address us on sentence. In imposing sentence the learned trial judge took into account the relevant factors. As he said in his grounds of judgment:

> Dalam mitigasi untuk meringankan hukuman, peguambela yang bijaksana memohon Mahkamah mengenakan hukuman dekat dengan minimum yang dibenarkan atas dasar OKT berumur 31 tahun, sudah berkahwin, mempunyai seorang anak berumur 6 tahun; OKT bekerja sebagai jurujual dengan pendapatan RM1,200/= sebulan.
>
> Bagi pihak pendakwaan pula, Penolong Pendakwa Raya yang bijaksana, memohon suatu hukuman yang setimpal dengan kesalahan dan menarik perhatian Mahkamah kepada kepentingan awam dan berat dadah supaya ia diberi pertimbangan saksama dalam menjatuhkan hukuman. Beliau juga mengesahkan bahawa OKT ada mempunyai satu kesalahan lampau menurut Pendaftaran Jenayah Pusat (P25), iaitu pada 14/9/1990 OKT telah dihukum penjara 1 hari dan denda S$200/= oleh Mahkamah Majistrate Singapura atas kesalahan mencuri dalam bangunan di bawah seksyen 380 Cap 224.
>
> Dalam menentukan hukuman yang setimpal dalam kes ini, Mahkamah telah meletak kepentingan awam sebagai pertimbangan utama daripada kepentingan peribadi kerana tujuan sesuatu hukuman itu bukan sahaja untuk menghukum OKT tetapi ia juga mestilah merupakan suatu langkah pencegahan kepada orang ramai daripada melakukan kesalahan.
>
> Kesalahan yang melibatkan dadah berbahaya adalah amat serius dalam negara kita. Penyalahgunaan najis dadah membawa kepada kemusnahan masyarakat. Jadi, hukuman yang dikenakan hendaklah mencerminkan keseriusan kesalahan itu. Dalam kes ini, OKT telah didapati bersalah selepas perbicaraan penuh apabila pertuduhan asal diperturunkan. Jadi, diskaun yang lazimnya diberi kepada pesalah yang mengaku salah tidak terpakai kepada OKT.

Berat dadah yang terlibat ialah 73.34 gram dan jenis dadah ialah monoacetylmorphines, dan semestinya ia perlu diambil kira dalam menentukan hukuman pemenjaraan dan sebatan. Berat dadah dalam kes ini adalah banyak, melebihi 68.34 gram daripada minimum 5 gram yang ditetapkan di bawah seksyen 39A(2)(c) Akta.

Jadi, memandangkan kepada factor-faktor di atas dengan mengambilkira kepentingan awam dan kepentingan OKT, saya telah menjatuhkan hukuman penjara selama 16 tahun mulai tarikh tangkap 23 September 1998 dan sebatan 11 kali, dengan penuh harapan semoga OKT akan insaf akan tindakan jijiknya dalam melakukan kesalahan ini dan sekaligus memberi amaran kepada orang awam betapa beratnya kesalahan yang melibatkan penyalahgunaan dadah berbahaya di negara ini.

We are unable to say that the learned trial judge had erred in imposing the sentence as he had taken relevant factors like the element of public interest and the weight of drugs involved into consideration.

In the upshot we dismiss the appeal against conviction and sentence.